

Re: Rule 1-100
November 19, 2004 Commission Meeting
Open Session Item III.A
Drafter: Mark L. Tuft

CLEAN VERSION

Rule ____ [1-100] Purpose and Function of the Rules of Professional Conduct

- (A) *Purpose:* The purposes of the following rules are:
- (1) To protect the public;
 - (2) To protect the interests of clients;
 - (3) To protect the integrity of the legal system and to promote the administration of justice; and
 - (4) To promote respect for, and confidence in, the legal profession.
- (B) *Scope:* These rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these rules, regulate the conduct of attorneys and are binding upon all members of the State Bar and all other lawyers practicing law in this State.

A [willful] violation of these rules is grounds for discipline.

Nothing in these rules or the comments to the rules is intended to enlarge or restrict existing law regarding the liability of lawyers to others.

- (C) *Comments:* The comments following the rules do not add obligations to the rules but provide guidance for interpreting and practicing in compliance with the rules.
- (D) *Title:* These rules are referred to as “The California Rules of Professional Conduct.”

Comment

[1] The Rules of Professional Conduct are rules of the Supreme Court of California regulating attorney conduct in this state. See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.3d 80]. The rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to California Business and Professions Code sections 6076 and 6077.

[2] The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules, however, are not designed to be a basis for civil liability. Therefore, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule.

[3] The prohibition of certain conduct in these rules is not exclusive. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other court rules and statutes and the opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted for guidance on proper professional conduct. [Ethics opinions and standards promulgated by other jurisdictions and bar associations may also be considered to the extent they are not inconsistent with these rules and the laws of this state.]

[4] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes stated on paragraph (A).

[5] These rules govern the conduct of members of the California State Bar in and outside this state, except as members of the State Bar may be specifically required by a jurisdiction in which they are lawfully practicing to follow rules of professional conduct different from these rules. These rules also govern the conduct of other lawyers practicing in this state, but nothing contained in these rules shall be deemed to authorize the practice of law by such persons in this state except as otherwise permitted by law. For the disciplinary authority of this state and choice of law, see rule 8.5.

SF:508933.1

Re: Rule 1-100
November 19, 2004 Commission Meeting
Open Session Item III.A
Drafter: Mark L. Tuft

ANNOTATED VERSION

Rule ____ [1-100] Purpose and Function of the Rules of Professional Conduct [1] [2] [3]

(C) *Purpose:*[4] The purposes of the following rules are:

- (1) To protect the public;
- (2) To protect the interests of clients;
- (3) To protect the integrity of the legal system and to promote the administration of justice; and
- (4) To promote respect for, and confidence in, the legal profession.

(D) *Scope:* These rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these rules, regulate the conduct of attorneys and are binding upon all members of the State Bar and all other lawyers practicing law in this State. [5]

A [willful] [6] violation of these rules is grounds for discipline.

Nothing in these rules or the comments to the rules is intended to enlarge or restrict existing law regarding the liability of lawyers to others. [7]

- (C) *Comments:* The comments following the rules do not add obligations to the rules but provide guidance for interpreting and practicing in compliance with the rules. [8]
- (D) *Title:* These rules are referred to as “The California Rules of Professional Conduct.” [9]

Comment

[1] The Rules of Professional Conduct are rules of the Supreme Court of California regulating attorney conduct in this state. See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.3d 80]. The rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to California Business and Professions Code sections 6076 and 6077. [10]

[2] The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules, however, are not designed to be a basis for civil liability. Therefore, a violation of the rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. [11]

[3] The prohibition of certain conduct in these rules is not exclusive. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other court rules and statutes and the opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted for guidance on proper professional conduct.[12] [Ethics opinions and standards promulgated by other jurisdictions and bar associations may also be considered to the extent they are not inconsistent with these rules and the laws of this state.] [13]

[4] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes stated on paragraph (A). [14]

[5] These rules govern the conduct of members of the California State Bar in and outside this state, except as members of the State Bar may be specifically required by a jurisdiction in which they are lawfully practicing to follow rules of professional conduct different from these rules. These rules also govern the conduct of other lawyers practicing in this state, but nothing contained in these rules shall be deemed to authorize the practice of law by such persons in this state except as otherwise permitted by law. For the disciplinary authority of this state and choice of law, see rule 8.5. [15] [16]

Drafter's notes:

1. The primary sources for this draft of proposed rule 1-100 are the October 29, 2002 draft of rule 1-100, the November 8, 2002 Commission meeting summary, Kevin's notes of the discussion of the purpose and function of the rules at the October 8, 2004 meeting, my February 13, 2003 survey of the purpose and function of the rules of professional conduct in other jurisdictions, and my October 29, 2002 memo to the Commission.
2. This draft is written from the perspective that it is better to have a clear crisp explanation of the purpose and function of the California rules rather than adopt the long Scope note that precedes the ABA Model Rules.
3. The proposed rule is designed with the following objectives in mind:
 - a. As rules of the California Supreme Court, the rules are binding on all lawyers who practice in this state, and the rules have the force of law.
 - b. A violation of the rules is a basis for imposing discipline. However, the rules are not intended to only apply in the disciplinary context.
 - c. The rules and comments are intended to provide guidance for lawyers and promote compliance.

- d. The rules are not designed to provide a basis for civil liability. However, the extent to which a court decides to apply a rule or the circumstances in which a violation of a rule is admissible in non-disciplinary cases cannot be legislated. For this reason, I have left out much of the discussion in ABA Scope, Comment 20.
 - e. The rules are basically imperatives. Areas where the lawyer has discretion to exercise professional judgment should be left to the comments and not be part of the rule. For this reason, I have not adopted the ABA's approach to include rules that are obligatory and disciplinary in part and partly constitutive and descriptive of a lawyer's professional obligations.
4. Each of the paragraphs of rule 1-100 begins with a separate heading for ease of reference.
 5. It seems to me that we need to state up front that the scope of the rules extends to the conduct of all lawyers engaged in the practice of law in this state and not just to members of the State Bar. That is certainly the case with respect to the newly adopted MJP rules of court, and it is consistent with current rule 1-100(D) (2). However, reference to the geographic scope of the rules has been deferred until we consider whether we want to have a rule similar to Model Rule 8.5.
 6. An important issue for discussion is whether discipline should be reserved only for a "willful" violation of the rules. This is the subject of Nace's memo. If we elect to stay with the "willful" standard, lawyers and the public would be better served if the rules include a definition of what "willful" means for purposes of the rules. The language in ABA Model Rule, Scope, paragraph 19 was not found to be useful.
 7. This language is culled from the discussion on the scope of the rules in a majority of the jurisdictions surveyed in my February 13, 2003 memo but without the surplus verbiage.
 8. I recommend that the commentary following the rule be characterized as "comments" and not "discussion" to be consistent with the format of the ABA Model Rules. I also recommend that the comments be

numbered as is the case with new rule 3-100 and proposed rules 7.1 – 7.5.

9. This represents a change from current rule 1-100(E), but it reflects how the rules are commonly referred to in California.
10. Comment [1] is intended to make clear that the rules are rules of the Supreme Court in regulating lawyer conduct and have the force of law. The second sentence comes from current rule 1-100(A) and describes the process.
11. Comment [2] is intended to convey the notion that the rules are mandatory and provide a framework for discipline. I personally do not like the language in ABA Model Rule, Scope, Comment 14. I agree with Mary Yen that having rules that provide both imperatives and permissive standards undermines the function of the rules. Matters of discretion or the exercise of professional judgment should be covered in the comments and not in the rule. I realize this may prove not to be universally possible, as in the case in new rule 3-100, but it is a proper bench mark for us to follow as we proceed with examining the rest of the rules. We may have to return to this issue, but for now, I believe it is the proper standard to use. The comment is also intended to make it clear that the rules are not merely rules of discipline and may be enforced in other context. However, the rules are expressly not designed to create civil liability and a violation of a rule, in itself, does not give rise to a private cause of action or damages against the offending lawyer.
12. Comment [3] is taken from current rule 1-100(A) and has been expanded to include other rules and statutes as well as case law.
13. The last sentence in Comment [3] also comes from current rule 1-100(A). It is considered optional and may not be needed. The sentence has been changed to omit reference to “rules” promulgated by other jurisdictions, since the rules in California should be sufficiently comprehensive to govern the conduct of lawyers in this state. The sentence has been further changed to make it clear that the opinions and standards of other jurisdictions can be considered if they are consistent with our rules. I am personally troubled by this sentence

and would leave it out. I was not able to find another state that included this provision in its rules.

14. Comment [4] is taken from the first sentence in ABA Model Rule Scope, paragraph 14.
15. Comment [5] is taken from current rule 1-100(D). However, it may be more appropriate to include this comment with rule 8.5, if we decide to adopt a version of that rule.
16. Deferred for further discussion is the issue whether the rule should include definitions or whether there should be a separate rule on “terminology.” I personally believe that including definitions in this rule is too much for one rule.

SF:508934.1